No. 14098

United States
Court of Appeals
for the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142, an Unincorporated Association,

Appellant,

vs.

LIBBY, McNEILL & LIBBY, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Hawaii.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. — 11-20-53

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

For the Petitioner, International Longshoremen's and Wharehousemen's Union, Local 142:

BOUSLOG & SYMONDS,
63 Merchant Street,
Honolulu 13, Hawaii.

For the Respondent:

BLAISDELL & MOORE, By
RAYMOND M. TORKILDSON,
302 Castle & Cooke Building,
Honolulu, Hawaii.

In the United States District Court for the District of Hawaii

Civil No. 1177

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142, an Unincorporated Association,

Petitioner,

vs.

LIBBY, McNEILL & LIBBY, a Corporation,

Respondent.

COMPLAINT FOR BREACH OF CONTRACT AND FOR DECLARATORY JUDGMENT

Now comes the International Longshoremen's and Warehousemen's Union, Local 142, an unincorporated association, petitioner, and for cause of action against Libby, McNeill & Libby, a corporation, respondent, alleges as follows:

I.

That during all times herein mentioned, International Longshoremen's and Warehousemen's Union, Local 142, hereinafter referred to as the union, was and now is an unincorporated labor organization in the Territory of Hawaii, and duly certified by the National Labor Relations Board to represent the employees of the respondent company in the Territory of Hawaii, including Miyuki Takahama; that during all times herein mentioned, said Miyuki Takahama was and now is a member of the

union, and [3*] from 1944 until October 3, 1951, was an employee of the respondent Libby, McNeill & Libby, hereinafter referred to as the company; that at all times herein mentioned the respondent company was and now is a corporation organized and existing under and by virtue of the laws of the State of Maine, and authorized to do and doing business in the Territory of Hawaii.

II.

That on the 15th day of December, 1950, the company and Pineapple and Cannery Worker's Local Union 152, affiliated with the International Longshoremen's and Wharehousemen's Union, hereinafter referred to as the ILWU, made and entered into a written collective baraining agreement effective on said date, and to remain in effect until February 1, 1953; that thereafter on September 14, 1951, said agreement was amended and extended to February 1, 1954; that said agreement has at all times since its effective date been in full force and effect.

III.

That subsequent to the execution of said agreement the said Local Union 152 consolidated with ILWU Local 142 and ever since has been and now is consolidated therewith; that by agreement between the company and ILWU Local 142, said Local 142 has become the successor to Local 152 with respect to said collective bargaining agreement; and all of the terms and provisions of said agreement are now binding between the company and the petitioner union.

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

IV.

That the jurisdiction of this Court to grant the relief prayed for herein by the union is based upon Section [4] 301(a) of the Labor-Management Relations Act, 1947, Title 29, U.S.C., Section 185, and upon the Declaratory Judgment Act, Title 28, U.S.C., Sections 2201, 2202.

V.

That on or about the 3rd day of October, 1951, the company informed said Miyuki Takahama that she was, as of October 3, 1951, being discharged and her employment with the company terminated upon the ground that she had reached the age of sixty-five years; that immediately thereafter the union notified the company that its action in discharging and terminating the employment of said Miyuki Takahama consituted a violation of the collective bargaining agreement heretofore referred to, and in that connection the union requested, within the time and in the manner provided for in the agreement, that the merits of the dispute be determined by the grievance procedure provided for in Section 23 of said agreement.

VI.

That pursuant to the provisions of said agreement the various steps provided for in the grievance machinery were carried through and said grievance was not adjusted to the satisfaction of the union in that the company asserted its action did not constitute a violation of any provision of the collective bargaining agreement.

VII.

That after complying with all the procedural steps provided for in the agreement with reference to the presentment of a grievance, the union requested, within the time and in the manner provided for in the agreement, that the grievance be presented to an arbitrator and that the company [5] meet with representatives of the union for the purpose of selecting an arbitrator in the manner provided for in Section 24 of the agreement.

VIII.

That on or about February 7, 1952, the company notified the union that it was the position of the company that there was no reasonable basis for the claim of the union, that there had been any violation of the terms of the agreement and hence there was no grievance within the meaning of the agreement; that the company further stated that to permit arbitration of the issue involved would be contrary to the express terms of the agreement; that accordingly the company did not regard the issue as within the jurisdiction of an arbitrator and therefore declined the request of the union.

IX.

That at all times since said February 7, 1952, the company has refused, failed, and neglected to comply with the said request of the union.

X.

That the action of the company hereinabove set forth was and is a violation and breach of the col-

lective bargaining agreement in that said agreement sets forth the sole means, methods and grounds for the discharge or termination of the employment of an employee of the company; that the agreement does not provide for the discharge or termination of employment upon the ground that the employee has reached the age of sixty-five years.

XI.

That the union was and now is ready, willing and able to present the issue of the discharge and removal of [6] said Miyuki Takahama from the payroll of the company to an arbitrator for determination.

XII.

That an actual controversy now exists between the company and the union as to the meaning and interpretation of the collective bargaining agreement, and it is necessary that this Court determine and declare the rights of the parties under the agreement, and that the company be restrained and enjoined from doing anything in derogation of the rights of petitioner based on the collective bargaining agreement.

XIII.

That the company has informed the union that it is the policy of the company to remove all employees of the company covered by the collective bargaining agreement from the payroll of the company upon their reaching the age of sixty-five. In that connection the union alleges that there are many employees of the company covered by the agreement

who will in the future reach said age and will thereupon be permanently removed from the employ of the company unless the company is restrained and enjoined.

XIV.

That in order to avoid a multiplicity of suits and irreparable injury to the union, it is necessary that this Court issue an injunction enjoining and restraining the company from removing any other employee of the company covered by the collective bargaining agreement from the payroll of the company, solely upon the ground that the [7] employee has reached the age of sixty-five years; that petitioner has no plain, speedy or adequate remedy at law.

Wherefore, petitioner prays judgment as follows:

1. That a declaratory judgment be made and entered herein determining and declaring the rights of petitioner and respondent under the collective bargaining agreement, and specifically declaring and adjudging that respondent breached the terms of the agreement in removing said Miyuki Takahama from the payroll of the company.

2. That the respondent be restrained and enjoined from removing any of its other employees covered by said collective bargaining agreement from its payroll solely upon the ground that the employee has reached the age of sixty-five years.

3. And for such other and further relief as the Court may deem proper in the premises.

Dated: Honolulu, T. H., this 29 day of May, 1952.

BOUSLOG & SYMONDS,

By /s/ MYER C. SYMONDS,
Attorneys for Petitioner.

[Endorsed]: Filed May 29, 1952. [8]

[Title of District Court and Cause.]

ANSWER

Comes Now the respondent, Libby, McNeill & Libby, by its attorneys, and for answer to the complaint of the petitioner in the above-entitled cause, says:

I.

Answering Paragraph I of the complaint, respondent admits that International Longshoremen's and Warehousemen's Union, Local 142, is an unincorporated labor organization in the Territory of Hawaii and duly certified by the National Labor Relations Board to represent some of the employees of the respondent in the Territory of Hawaii, including Miyuki Takahama, and that at all times mentioned in the complaint the respondent was and now is a corporation organized and existing under and by virtue of the laws of the State of Maine, and is authorized to do and is doing business in the Territory of Hawaii, and

that said Miyuki Takahama was an intermittent employee of respondent from June 18, 1942, until August 21, 1942, that she was again employed by the respondent from September 31, 1942, to December 31, 1946; that on or about December 31, 1946, she was retired from employment with the respondent by reason of the fact that she had reached the age of sixty years, such retirement being pursuant to the respondent's policy of retirement to retire [10] from active service all women employees at the age of sixty years; that thereafter on or about June 16, 1947, she was rehired following a change in respondent's retirement policy in Hawaii extending the normal retirement age of women employees to sixty-five years, and continued in respondent's employment until on or about September 28, 1951. Respondent is without knowledge or belief as to the truth of each and every other allegation contained in said Paragraph I of the complaint, and therefore denies such allegations.

II.

Answering Paragraph II of the complaint, respondent admits and alleges that on the 15th day of December, 1950, Pineapple and Cannery Workers Local Union 152, International Longshoremen's and Warehousemen's Union, hereinafter referred to as Local 152, entered into a collective bargaining agreement in writing with Libby, McNeill & Libby, this respondent; that thereafter on the 14th day of September, 1951, said agreement was amended; said agreement is,

and at all times mentioned herein was, in full force and effect. A copy of said agreement, including said amendment, is attached hereto marked Exhibit A and made a part hereof as though the same had been fully set forth herein.

Section 5 of said agreement provides as follows:

"Seniority. In case of layoff, or recall after layoff, length of continuous service with the Company shall govern where all other relevant factors (such as merit, ability, performance, t u r n o u t, physical and mental fitness) are relatively equal. This principle of seniority shall not apply to any employee until he shall have completed six (6) months of continuous service with the Company. Seniority shall be considered broken by (a) discharge, (b) resignation, or (c) six (6) consecutive months of unemployment.

"Before hiring new employees for or promoting present employees to p e r m a n e n t job vacancies above Labor Grade 1 covered by this contract, the job shall be posted on the bulletin boards for a period of seventy-two (72) hours before the job vacancy is filled. This shall not be construed to preclude temporary transfers to fill job vacancies when necessary.

"In making promotions and filling permanent job vacancies, the Company will consider the qualifications of the employee for the job. Where in the judgment of management [11] all of the relevant factors (such as merit, ability, performance, turnout, physical and mental fitness) are relatively

equal, length of service will govern promotions. Grievances resulting from promotions shall be subject to the grievance procedure (Section 23) of the contract but not to arbitration, and all final decisions and judgment of management shall be binding on the parties.

"The Company shall make available to the Union any pertinent seniority information that may be required in the processing of a grievance."

Section 22 of said agreement provides as follows:

"Discharge. Employees shall be subject to discipline or discharge by the Company for insubordination, p i l f e r a g e, drunkenness, incompetence, failure to perform the work as required, violation of the terms of this agreement or failure to observe safety rules and regulations, and the Company's house rules which shall be conspicuously posted. Any discharged employee shall, upon request, be furnished the reason for his discharge in writing. Any employee who has not had six (6) months of continuous service with the Company since the date of his last employment may be summarily discharged. In the event of conflict between the house rules and provisions of this agreement, the agreement will prevail."

Section 17 of said agreement provides as follows:

"Separation Allowance. Regular full-time employees who have completed five (5) or more years of continuous service and who are permanently dropped from service for reasons clearly beyond their own control, shall receive separation allowance to be determined in amount as follows:

"Five years but less than six—two and one-half weeks.

"For each full year in excess of five—and additional one-half week.

"Pay shall be computed upon the basis of a forty (40) hour week and at the classified hourly rate applicable to the employee immediately preceding separation.

"Separation allowance will not be paid in the event of resignation, discharge, or retirement, and this entire provision shall be inapplicable in the event of liquidation of the Company.

"The Company shall determine at the time of layoff whether or not it is expected to be a permanent separation; and if it is not so expected, the employee will not receive separation allowance.

"An employee receiving separation allowance shall forfeit all seniority rights and any other privileges, rights or benefits to which such an employee may now or hereafter be entitled."

III.

Respondent admits the allegations contained in Paragraph [12] III of the complaint.

IV.

Respondent is without knowledge or belief as to the truth of the allegations contained in Paragraph IV of the complaint and therefore denies such allegations.

V.

Answering Paragraph V of the complaint, respondent admits and alleges that on or about the

28th day of September, 1951, said Miyuki Takahama was retired from active service with the respondent by reason of the fact that she had reached the age of sixty-five years, such retirement being pursuant to the respondent's well-known and long-standing policy of retirement to retire from active service all employees when they reach the age of sixty-five years; that on or about the 3rd day of October, 1951, said Miyuki Takahama presented an alleged grievance to respondent alleging a violation by respondent of Sections 5 and 22 of the collective bargaining agreement heretofore referred to; that thereafter, a representative of Local 152 presented said alleged grievance in successive steps to respondent's assistant plant manager, plant manager, general plant manager, to a grievance committee and to respondent's general manager.

Except as herein admitted, respondent denies each and every allegation contained in Paragraph V of the complaint.

VI.

Answering Paragraph VI of the complaint, respondent admits and alleges that a representative of Local 152 presented said alleged grievance in successive steps to respondent's assistant plant manager, plant manager, general plant manager, to a grievance committee, and to respondent's general manager; that at each such step of the grievance procedure respondent took the position that said Miyuki Takahama was retired pursuant to respondent's well-known and long [13] standing

policy of retirement to retire from active service all employees when they reach the age of sixty-five years.

Except as herein admitted, respondent is without knowledge or belief as to the truth of each and every allegation contained in Paragraph VI of the complaint and therefore denies such allegations.

VII.

Answering Paragraph VII of the complaint, respondent admits and alleges that following the presentation of said grievance as hereinabove alleged, a representative of Local 152 requested that the alleged grievance be submitted to an arbitrator to be selected by the petitioner and the respondent under the provisions of Section 24 of said agreement.

VIII.

Respondent admits the allegations contained in Paragraph VIII of the complaint.

IX.

Answering the allegations contained in Paragraph IX of the complaint, respondent alleges that since February 7, 1952, it has maintained its position as alleged in paragraph VIII of the petitioner's complaint herein regarding said request of the union. Except as herein admitted, respondent denies each and every allegation contained in Paragraph IX of the complaint.

X.

Answering Paragraph X of the complaint, respondent denies each and every allegation contained in said paragraph.

XI.

Respondent is without knowledge or belief as to the truth of the allegations contained in Paragraph XI of the complaint and therefore denies such allegations.

XII.

Answering Paragraph XII of the complaint, respondent denies each and every allegation contained in said Paragraph XII. [14]

XIII.

Answering Paragraph XIII of the complaint, respondent admits and alleges that it has informed the petitioner that the respondent's retirement policy provides that all employees shall retire from active service when they reach the normal retirement age of sixty-five years.

Further answering said paragraph, respondent alleges that said retirement policy has been long established, and that at all times mentioned herein and prior to the execution of the collective bargaining agreement heretofore referred to said retirement policy was well-known by Local 152, by the petitioner and by respondent's employees.

Further answering said paragraph, Respondent alleges that the subject of retirement of employees was discussed in collective bargaining negotiations between respondent and Local 152 which resulted in said collective bargaining agreement and in other collective bargaining agreements executed prior thereto between respondent and Local 152 and that no provision relating to the subject of

retirement was included in any of said collective bargaining agreements except as provided in Section 17 of said agreement hereinabove set forth.

Further answering Paragraph XIII of the complaint and except as herein admitted, respondent is without knowledge or belief as to the truth of each and every allegation contained in said paragraph and therefore denies such allegations.

XIV.

Answering Paragraph XIV of the complaint, respondent denies each and every allegation contained in said paragraph.

Wherefore, respondent respectfully prays that the [15] complaint herein be dismissed and that respondent be given judgment for all costs taxable herein and may have such other and further relief as the justice of the cause may require.

Dated at Honolulu, T. H., this 3rd day of September, 1952.

LIBBY, McNEILL & LIBBY,
Respondent,

By BLAISDELL and MOORE,

By /s/ R. M. TORKILDSON,
Attorneys for Respondent.

Receipt of copy acknowledged.

[Endorsed]: Filed September 3, 1952. [16]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

Before the Hon. J. Frank McLaughlin, Judge.

Appearances

Attorney for Petitioner:

BOUSLOG & SYMONDS, By
JAMES A. KING.

Attorney for Respondent:

BLAISDELL & MOORE, By
RAYMOND M. TORKILDSON.

Nature of Proceedings

This is a suit for declaratory judgment, seeking to establish the rights of the petitioner union under a collective bargaining agreement and specifically to declare and adjudge that said collective bargaining agreement has been violated by the respondent with respect to an employee named Miyuki Takahama. It is prayed in this action that the respondent be enjoined from continuing to violate the collective bargaining agreement by retiring people of 65 years for age.

Admitted Facts

The following facts have been agreed upon by the [21] parties and require no proof:

1. That the International Longshoremen's and Warehousemen's Union, Local 142, is the duly certified bargaining agent to represent the employees of the respondent company, including Miyuki

Takahama, having been certified for that purpose by the National Labor Relations Board.

2. That Miyuki Takahama on the date of the filing of this complaint, May 29, 1952, was a member of the union and had been employed by the respondent intermittently from July 18, 1942, until August 21, 1942, and thereafter from September 31, 1942, to December 31, 1946, on which latter date Mrs. Takahama was separated from the employ of the respondent, but resumed the status of an employee on or about June 16, 1947, remaining such until September 28, 1951. Mrs. Takahama on August 8, 1951, had attained the age of 65.

3. The respondent is a corporation organized under the laws of the State of Maine and authorized to do business in the Territory of Hawaii.

4. The union has had during the period of time here involved a collective bargaining contract with the respondent, a copy of which is marked as Pre-Trial Exhibit No. 5. The rights of Local 152 mentioned in said contract passed to the petitioner herein as its successor.

5. On September 28, 1951, Mrs. Takahama was separated by oral notice from the employ of the respondent for the assigned reason that she had celebrated her 65th birthday.

6. Thereafter, pursuant to the grievance procedure provided for in the Collective Bargaining Agreement, Pre-Trial Exhibit No. 5, Mrs. Taka-

hama invoked said provisions, [22] asserting that she had been improperly separated from the respondent's employ in violation of Sections 5 and 22 of said contract.

7. Mrs. Takahama's grievance was not adjusted under the grievance machinery of the contract, and as a result in her behalf the union requested the respondent to submit the issue to arbitration, which request was not acceded to.

8. Mrs. Takahama, during all periods of time that the petitioner and respondent had a collective bargaining agreement when an employee of the respondent, was covered by said contract as a covered intermittent employee.

Petitioner's Contention of Fact

1. That the respondent violated the existing collective bargaining agreement, Pre-Trial Exhibit No. 5, by discharging Mrs. Takahama on September 28, 1951, for having arrived at the age of 65 years.

2. That at the time of Mrs. Takahama's separation from the employment of respondent, she did not become entitled to nor did she receive any pension or retirement allowance or separation allowance or any other gratuity.

3. That Mrs. Takahama was not laid off (see Pre-Trial Exhibit No. 1) nor was she discharged on the date of her separation for any of the causes for discharge set forth in the contract, Pre-Trial Exhibit No. 5.

4. That Mrs. Takahama's grievance should have been arbitrated under the contract. [23]

Respondent's Contention of Fact

1. That Mrs. Takahama was retired for age, pursuant to a long standing policy of retiring people for age, which said policy varied from time to time both as to the factor of age and the factor of sex.

2. That the collective bargaining agreement, Pre-Trial Exhibit No. 5, in no way abrogated the respondent's alleged reserved inherent right to retire employees for age.

3. That Section 22 does not enumerate all the grounds for the discharge for cause which may be invoked by the respondent.

4. That Mrs. Takahama's grievance was not a subject for arbitration under the provisions of this contract.

Petitioner's Contentions of Law

1. That the separation of Mrs. Takahama was a violation of the existing contract, Pre-Trial Exhibit No. 5, in that it was neither a layoff nor a discharge and was in no wise provided for by any of the contract's terms.

2. That Mrs. Takahama's grievance should have been arbitrated under the contract.

Respondent's Contentions of Law

1. That the provisions of the collective bargaining agreement, Pre-Trial Exhibit No. 5, in no way

abrogated or modified or interfered with the respondent's asserted right to retire an employee for age.

2. That the contract in Section 22 did not exhaust the causes for discharge under the contract, which might be [24] relied upon by the respondent.

3. That the separation of this employee from respondent's employ did not violate her seniority or the rights under Section 5 of said contract, nor did it constitute a discharge under Section 22.

4. That Mrs. Takahama's grievance was not a subject for arbitration under the provisions of the contract.

5. That the Court has no jurisdiction to grant injunctive relief.

6. That the facts asserted by the petitioner do not show it to be entitled to equitable relief.

Issues of Fact

1. The petitioner denies the existence on the part of the respondent of any long standing policy of retiring employees for age.

2. The respondent contrariwise contends that it did have such a policy which varied from time to time as to age and sex.

Issues of Law

See Contentions of Law of respective parties above.

Exhibits

1. Seniority List.

2, 3, and 4. Names of other employees apt to be affected by the alleged retirement for age policy within the near future.

5. The collective bargaining agreement as modified and existing on the date of the separation of Mrs. Takahama [25] from respondent's employ.

It is Hereby Ordered that the foregoing constitutes the pre-trial order in the above-entitled cause, that it supersedes the pleadings, which are hereby amended to conform hereto, and that said pre-trial order shall not be amended during the trial except by consent or by order of the Court to prevent manifest injustice.

Dated May 11, 1953.

/s/ J. FRANK McLAUGHLIN,
United States District Judge.

[Endorsed]: Filed May 11, 1953. [26]

[Title of District Court and Cause.]

DECISION

This case is before the Court after hearing pursuant to its Pre-Trial Order of May 11, 1953. By its own terms the order supersedes the pleadings previously filed; it presents the admitted facts and issues of fact and law involved in a controversy over a collective bargaining contract presently existing between the parties.

The first question to be decided is whether or not this Court has jurisdiction to hear the case involving this controversy in relation to the relief demanded under the allegations of jurisdiction contained in the complaint. It invokes jurisdiction under 29 USC 185; the prayer for relief asks a declaration of the contractual rights and duties of the parties under the Declaratory Judgment Act, 28 USC 2201, 2202, and enforcement of the contract by injunction of the alleged breach.

Section 2201 of the Declaratory Judgment Act provides [28] in part that in case of certain actual controversies within its jurisdiction any court of the United States may declare the rights and other legal relations of any interested party seeking such declaration. Thus it seems that this statute does not confer jurisdiction, but merely provides this type of remedy in the federal court. Skelly Oil Co. v. Phillips Petr. Co., (1949) 339 US 667 at 671-2, 70 S.Ct. 876, 94 L.Ed. 1194. Therefore, under the allegations in the instant case, jurisdiction must be found to exist, if at all, under 29 USC 185(a).

That section provides in part.

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, with-

out respect to the amount in controversy or without regard to the citizenship of the parties."

In the case of Castle & Cooke Terminals, Ltd., v. Local 137 of the International Longshoremen's and Warehousemen's Union, et al., 110 F. Supp. 247 (1953) we had occasion to consider the applicability of this section to a demand by an employer for an injunction of an alleged breach of a no-strike contract by the defendant union. The issue of removability was involved, and this in turn depended upon the possible origin of the cause of action in federal law. This Court thought that, among other reasons, the restrictions against anti-labor injunctions surviving in the Norris-LaGuardia Act (29 USC 101-115, 104) prevented this Court from giving the [29] only relief demanded. Reference was made in that opinion to congressional committee reports and statements in Congress by an author of the bill containing section 185. Therein it appeared that the attention of Congress was on the subject of suits for money damages for breach of these collective bargaining contracts. This being true, it follows that Congress can hardly be said to have intended to act, through section 185, in the field of injunctions, whether they would be granted for or against the labor side of such a controversy. Therefore, the section gave the courts no new power to enjoin the acts in question. Without power to act in the matter, there was no original jurisdiction of the equity suit.

With this background, the question of constitu-

tionality of 29 USC 185 was raised in this court in Waialua Agricultural Co., Ltd., v. United Sugar Workers, ILWU, et al., Civil 1132, decided June 18, 1953, amended July 17, 1953. That action was for damages for breach of a labor relations contract, sought by the employer from the union which contended that this section was an invalid attempt to extend the federal judicial power when it purported to confer jurisdiction irrespective of diversity of citizenship. This Court agreed with several others that section 185 is not unconstitutional for this reason, because it was intended to, and did, create substantive federal law. The ramifications of that law were not declared by Congress; indeed, it did not indicate whether it intended the federal courts to apply the contract law of the states wherein they sit, [30] or to develop a separate and distinct federal common law of collective bargaining contracts where interstate commerce is affected. It now appears that such a federal common law may be in the course of development, although all courts are not in agreement on the extent or nature of the rights created by the legislation, nor do they agree upon the extent of the remedies available. See, as examples:

Wilson and Co. v. United Packinghouse Workers, 83 F. Supp. 162 (1949 SDNY);

Colonial Hardwood Flooring Co. v. Internat., etc., Union, 76 F. Supp. 493 (1948 D. Maryland) aff'd 168 F. 2d 33;

Shirley-Herman v. Internat. Hod Carriers, etc., 182 F. 2d 806 (2 Cir. 1950);

Schatte v. International Alliance, etc., 84 F. Supp. 669, aff'd 182 F. 2d 158, reh. denied, 183 F. 2d 685, cert. denied, 340 US 827, reh. denied, 340 US 885;

Textile Workers Union of America v. Aleo Mfg. Co., 94 F. Supp. 626 (1950 M.D. N.C.);

United Shoe Workers v. LeDanne, 83 F. Supp. 714 (1949 D. Mass);

Duris, et al., v. Phelps-Dodge, et al., 87 F. Supp. 229 (1949 D. N.J.);

Studio Carpenters, et al., v. Loew's Inc., 182 F. 2d 168 (9 Cir. 1950);

A. F. of L. v. Western Union, 179 F. 2d 535 (6 Cir. 1950).

When it becomes necessary to analyze the extent of the jurisdiction conferred by 29 USC 185, it would seem generally true that the jurisdiction granted will not be found to have a wider scope than necessary to complete the permissible action of the court in these circumstances of limited jurisdiction. This concept was expressed in [31] the Castle & Cooke case (supra) when we referred to the "absurdity of a case which 'may be brought' in a federal district court in which there is no power to give the relief demanded." In that case the injunctive relief had been demanded by an employer against a union. Here the question is whether this court has power under this section, wherein diversity of citizenship is not a jurisdictional basis, to grant an injunction against an employer at the

demand of a union. In Castle & Cooke, the latent lack of clarity of the section was disclosed by reference to surviving limitations in the Norris-LaGuardia Act. There is some doubt about whether those limitations have the same application where the labor organization is plaintiff (see Duris, et al., v. Phelps-Dodge, et al., 87 F. Supp. 229 (1949 D.N.J.); contra Textile Workers Union of America v. Aleo Mfg. Co., 94 F. Supp. 626 (1950 M.D.N.C.)). It seems helpful here to recall our conclusion that Congress had in mind suits for damages when it acted in passing section 185, and apparently was thinking primarily of suits by employers against unions in contract cases, since it showed most consideration for the welfare of individual union members and their estates by exempting the latter from liability for judgments obtained against the unions. It is true that no obstruction was placed in the way of a suit by a union for damages, and equally true that the unions have since taken advantage of their capacity to sue for monetary recovery: Lexington Federation of Tel. Workers v. [32] Ky. Tel. Corp., 11 FRD 526 (1951 E.D. Ken.); Durkin v. J. Hancock Life Insurance Co., 11 FRD 147 (1950 S.D.N.Y.); United Shoe Workers v. LeDanne, 83 F. Supp. 714 (1949 D. Mass.); Studio Carpenters, etc., v. Loew's Inc., 182 F. 2d 168 (9 Cir. 1950).

The fact that parties have elected to seek damages rather than equity relief under this section does not of itself necessarily set any limitations or indicate the intent of Congress. It is our opinion that 29 USC 185 conferred jurisdicition for the

sole purpose of actions for damages. Whatever equity power the court may have, exclusive of ancillary remedies, it must therefore stem from some other basis of jurisdiction than section 185, and no other basis has been alleged here.

We recognize that a divergence exists between this view and that of a few other courts which have taken jurisdiction of suits under 29 USC 185 for injunctions of breach of collective bargaining contracts or for other related equitable remedies:

> Textile Workers Union of America v. Aleo Mfg. Co., 94 F. Supp. 626 (1950 N.D.N.C.);
>
> Textile Workers Union of America v. Arista Mills Co., 193 F. 2d 529 (4 Cir. 1951);
>
> Mt. States Div., etc., v. Mt. States Tel. Co., 81 F. Supp. 397 (1948 D. Col.);
>
> A. F. of L. v. Western Union, etc., Co., 179 F. 2d 535 (6 Cir. 1950);
>
> Textile Workers Union of America v. American Thread Co., DC Mass., Civil 52-503, June 5, 1953.

In the light of the legislative history of this section, however, this Court feels that it cannot properly be said [33] that Congress intended to act in a field to which its attention clearly was not directed. Therefore, this case, in which jurisdicition is alleged to exist solely under 29 USC 185, and in which the demand is for an injunction of breach of a labor relations contract after a declaration of the rights of the parties, is before a court which has not been given the power to grant the relief

prayed for, and the case must therefore be dismissed.

This appears to be the extent of the questions to which the Court may properly give its attention; we need not, therefore, go into detail in expressing our doubts that this contract included retirement as a subject of the collective bargaining between these parties.

Dated at Honolulu, Hawaii, August 6, 1953.

/s/ J. FRANK McLAUGHLIN,
United States District Judge.

[Endorsed]: Filed August 6, 1953. [34]

In the United States District Court for the District of Hawaii

Civil No. 1177

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142, an Unincorporated Association,

Petitioner,

vs.

LIBBY, McNEILL & LIBBY, a Corporation,

Respondent.

ORDER OF DISMISSAL

The above-entitled action having come on for hearing before this Court on the 12th day of May, 1953, pursuant to the Court's pre-trial order of

May 11, 1953, and the Court having filed its written decision on August 6, 1953, holding that said action must be dismissed upon the ground and for the reason that this Court lacks jurisdiction of said action,

Wherefore, It Is Ordered, Adjudged and Decreed that the said action be, and the same hereby is, dismissed.

Dated at Honolulu, T. H., this 12th day of August, 1953.

/s/ J. FRANK McLAUGHLIN,
Judge of the Above-Entitled Court.

Approved as to Form:

BOUSLOG & SYMONDS,

By /s/ MEYER C. SYMONDS,
Attorneys for Petitioner.

[Endorsed]: Filed August 12, 1953. [36]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now International Longshoremen's and Warehousemen's Union, Local 142, petitioner above named, by Bouslog & Symonds, its attorneys, and moves this Honorable Court that the Order of Dismissal entered herein on August 12, 1953, be vacated and set aside and that a new trial be granted in

that the Court erred in dismissing the above-entitled action upon the ground and for the sole reason that the Court lacked jurisdiction of the action.

This motion will be based upon the Points and Authorities filed herewith and upon all the records and files herein.

Dated: Honolulu, T. H., this 21st day of August, 1953.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142,
Petitioner.

By BOUSLOG & SYMONDS,

By /s/ EDWARD H. NAKAMURA,
Its Attorneys. [38]

NOTICE OF MOTION

To Blaisdell & Moore, Attorneys for Libby, McNeill & Libby, a Corporation, Respondent:

You and Each of You Will Please Take Notice that the foregoing motion for new trial will be heard before the Honorable J. Frank McLaughlin in his courtroom in the Federal Building, Honolulu, T. H., on Thursday, September 3, 1953, at 9:00 a.m., or as soon thereafter as the motion can be heard.

Dated: Honolulu, T. H., this 21st day of August, 1953.

BOUSLOG & SYMONDS,

By /s/ EDWARD H. NAKAMURA,
Attorneys for Petitioner. [39]

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR NEW TRIAL

This Court has jurisdiction to grant a new trial. (Federal Rules of Civil Procedure, Rule 59.)

The Court erred in holding that the federal court does not have jurisdiction to grant a declaratory judgment and injunction for breach of a collective bargaining agreement. (See cases cited on page 6 of the Decision herein.)

The holding of the Court, "It is our opinion that 29 U.S.C. 185 conferred jurisdiction for the sole purpose of actions for damages," is erroneous. Section 185 (a) specifically provides that suits for violation of contracts between an employer and a labor organization representing employees may be brought in the district court. There are no words of limitation with respect to the nature of a suit over which the court has jurisdiction. The language in paragraph "b" that any money judgment against a labor organization shall [40] be enforceable only against the organization as an entity and against its assets, are not words limiting the jurisdiction of the court to entertain suits under paragraph "a" to suits seeking money judgments for damages for violation of the collective bargaining agreement. The words referred to in paragraph "b" are words of limitation only with respect to the type of money judgments that the court may give in the event a suit seeks the same.

In its present decision, this Court referred to its

opinion in the Castle & Cooke Terminals v. Local 137, etc., 110 F. Supp. 247. Therein this Court, after referring to Congressional statements, in effect concluded that it was the Congressional intent that Section 185 was intended to confer jurisdiction only with respect to money judgments. It is submitted this conclusion is erroneous. Senator Murray at the time of debate made this statement:

> "Section 301 of Title II of the bill gives the Federal district courts broad jurisdiction to entertain suits for breach of collective-bargaining contracts in industries affecting interstate commerce, regardless of the amount in controversy and of the citizenship of the parties. This section permits suits by and against a labor organization representing employees in such industries, in its common name, with money judgments enforceable only against the organization and its assets."
>
> See Congressional Record, 4/25/47, page 4153. Also quoted in "The New Labor Law" by the Bureau of National Affairs in Appendix E (7)-1.

Also, Senator Smith made this statement:

> "I now come to Title III, which is very brief, and merely provides for suits by and against labor organizations, and requires that labor organizations, as well as employers, shall be responsible for carrying out contracts legally entered into as the result of collective bargaining. That is all Title III does. I cannot con-

ceive of any sound reason why a party to a contract should not be responsible for the fulfillment of the contract; it is outside my comprehension how anyone can take such a position."

See Congressional Record, 4/30/47, page 4410. [41] Also quoted in "The New Labor Law" by the Bureau of National Affairs in Appendix E (7)-3.

Furthermore, although disagreeing with this Court's decision in the Castle & Cooke Terminals case as it is in conflict with the decided cases referred to by the Court in its present decision on page 6, assuming the Court to be correct, its decision is limited to its holding that Congress, by way of Section 185 (a), did not intend to change the existing limitation imposed by the Norris-La Guardia Act to permit district courts to hear injunction suit cases against labor organizations even though they should arise out of violations of labor relations contracts. The instant suit seeks primarily a declaratory judgment with respect to the rights of the parties under the collective bargaining agreement with respect to the sole issue of retirement. The injunction prayed for would only be granted after the court has declared the rights of the parties, and then, only in event it finds the employer to have violated the agreement with respect to retirement. Thus, two grounds of relief are sought. Even though this Court may be of the opinion that its decision in the Castle & Cooke Terminals case be correct

because of the Norris-LaGuardia Act, the decision does not prevent the Court from having jurisdiction to grant the declaratory relief prayed for.

Section 185 is part of the amendment to the National Labor Relations Act adopted by Congress with the intention of trying to bring about peaceful management-labor industrial relations. Certainly it cannot be denied that the first step in carrying out such intent is for the Court, when the parties do not agree upon the meaning of their written agreement, to construe the agreement for the parties so that they will know their rights and [42] obligations.

The decision of this Court in the instant case, instead of helping to bring about industrial harmony as intended by Congress, leaves the parties in a state of disagreement with respect to the meaning of their agreement, thus tending to bring about disharmony and friction in the field of labor-management relations.

Dated: Honolulu, T. H., this 21st day of August, 1953.

BOUSLOG & SYMONDS,

By /s/ EDWARD H. NAKAMURA,

Attorneys for Petitioner.

[Endorsed]: Filed August 21, 1953. [43]

[Title of District Court and Cause.]

RULING ON MOTION FOR NEW TRIAL

By a timely motion pursuant to Rule 59 of the Federal Rules of Civil Procedure, the plaintiff in this action has moved for a new trial. The essential ground of the motion appears to be that the court erred in interpreting the extent of the jurisdiction granted by 29 U.S.C. 185, which is the sole basis alleged for jurisdiction of this action. Under the decision, jurisdiction is conferred on district courts, irrespective of citizenship of the parties or the amount in controversy, only in suits for damages arising from violation of collective bargaining contracts between an employer in interstate commerce and a recognized bargaining representative of his employees.

The plaintiff's first argument is that the wording of the statute is clearly broader than this, and does not require this limited interpretation. If this were the only statute bearing upon the situation this point would [45] probably have more weight. However, we have pointed out that the presence of surviving jurisdictional limitations imposed by the Norris-LaGuardia Act, 29 U.S.C. 104, raised, in a prior case (Castle and Cooke Terminals, Ltd., v. Local 137 of ILWU, 110 F. Supp. 247, Hawaii, 1953), a latent ambiguity as to the actual intent of Congress when it was in the course of passing this section which is a part of the Taft-Hartley or Labor-Management Relations Act of 1947. To resolve that ambiguity in deciding Castle and Cooke

(supra) we referred to committee reports and statements of the authors of the bill and concluded that the attention of Congress was on suits for damages, and on the point of relieving individual union members from financial responsibility should such suits go against their union, and not upon the field of injunctive remedies at all.

We adhere to our interpretation of the intent of Congress because it seems to be irresistible that, once an ambiguity is shown to exist in a statute, and the ambiguity is resolved by consultation of the proper Congressional records which show the legislative intent to have been focused on a limited field, we cannot find that Congress intended to act in other fields which it clearly did not have in mind. Therefore we still think that Section 185 does not constitute a basis of jurisdiction for the instant action.

Another argument by plaintiff is that even if the court does not have the power to grant an injunction, it [46] should declare the rights of the parties herein without attempting to give the other relief asked.

The Declaratory Judgment Act, 28 U.S.C. 2201, 2202, gives the court power to make such a judgment in a case of actual controversy within its jurisdiction. It provides, inter alia, that this may be done whether or not further relief is or could be sought. It appears well settled, however, that this Act does not repeal or modify the basic requirements of jurisdiction previously imposed, and if the

court has not had power over certain subject matter or persons, the declaratory judgment statute does not give it.

> Skelly Oil Co. v. Phillips Petr. Co. (1949), 339 U.S. 667, at 671-2;
>
> Doehler Metal Furn. Co., Inc., v. Warren, 129 F. 2d 43 (App.D.C., 1942).

It follows that the mere fact that a declaratory judgment is sought is not, of itself, a ground of federal jurisdiction:

> Calif. Ass'n of Employers v. Bldg. and Const. Trades Council, etc., 178 F. 2d 175, at 177 (9 Cir. 1949).

Thus the expression "whether or not further relief is or could be sought" in 28 U.S.C. 2201 refers to whether the controversy between the parties has reached a stage at which some further remedy could be demanded according to recognized principles of law. It does not permit the assumption of jurisdiction which would not otherwise exist.

Finally, it is argued that compliance with the demands for relief in this case would most effectively carry out the declared policy of Congress in enacting the [47] legislation of which 29 U.S.C. 185 is a part—the promotion of peaceful relations between these and similar parties:

> 29 U.S.C. 141 (b).

However true this might be, where there are indications that Congress intended the courts to go

only so far in carrying out its policies, it is not within the province of the court to go further because it or the parties think Congress should have done more than it did.

For the reasons expressed herein, the motion for new trial is denied.

Dated: Honolulu, Hawaii, September 25, 1953.

/s/ J. FRANK McLAUGHLIN,
United States District Judge.

[Endorsed]: Filed September 25, 1953. [48]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that International Longshoremen's and Warehousemen's Union, Local 142, an unincorporated association, petitioner above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of Dismissal made and entered herein on the 12th day of August, 1953, holding that the action must be dismissed upon the ground and for the reason that the Court lacks jurisdiction of the action, and from the ruling on motion for new trial made and entered herein on September 25, 1953, denying the motion for new trial for the same reason as set forth in the Order of Dismissal.

Dated: Honolulu, T. H., this 1st day of October, 1953.

BOUSLOG & SYMONDS,

By /s/ EDWARD H. NAKAMURA,

Attorneys for Appellant International Longshoremen's and Warehousemen's Union, Local 142, an Unincorporated Association.

[Endorsed]: Filed October 1, 1953. [50]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to Libby, McNeill & Libby, a corporation, respondent, the sum of Two Hundred Fifty and 00/100 Dollars ($250.00). The condition of this bond is that, whereas the petitioner has appealed to the Court of Appeals for the Ninth Circuit by notice of appeal filed October 1, 1953, from the order of this Court, dated August 12, 1953, and from the ruling on Motion for New Trial entered September 25, 1953, if the petitioner shall pay all costs adjudged against it if the appeal is dismissed or the order affirmed, or such costs as the appellate court may award if the order is modified, then this bond is to be void, but if the petitioner fails to perform this condition, [52] payment

of the amount of this bond shall be due forthwith.

Dated: Honolulu, T. H., this 1st day of October, 1953.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142, an Unincorporated Association, Petitioner,

By /s/ ANTONIO RANIA,
Its President,
Principal.

[Seal] UNITED STATES FIDELITY & GUARANTY COMPANY,

By /s/ JOHN F. HRON,
Its Attorney in Fact,
Surety.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 1st day of October, 1953, before me appeared Antonio Rania, to me personally known, who being duly sworn did say that he is the President of the International Longshoremen's and Warehousemen's Union, Local 142, which is the principal named in the foregoing Bond on Appeal, and that he acknowledged said instrument as his free act and deed.

[Seal] /s/ J. D. MARQUES,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires: July 15, 1957.

Territory of Hawaii,
City and County of Honolulu—ss.

On this 1st day of October, 1953, before me personally appeared John F. Hron, to me personally known, who [53] being duly sworn did say that he is the Attorney-in-Fact of the United States Fidelity and Guaranty Company, duly appointed under Power of Attorney dated the 30th day of November, 1936, which Power of Attorney is now in full force and effect, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation under the authority of its Board of Directors, and said John F. Hron acknowledged said instrument to be the free act and deed of said corporation.

[Seal] /s/ MARY LUIS,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My Commission expires May 31, 1955.

[Endorsed]: Filed October 1, 1953. [54]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD ON APPEAL

United States of America,
District of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do

hereby certify that the foregoing record on appeal in the above-entitled cause, numbered from page 1 to page 57, consists of a statement of the names and addresses of the attorneys of record, and of the various pleadings and transcripts of proceedings as hereinbelow listed and indicated:

Originals:

Complaint for Breach of Contract and for Declaratory Judgment.

Answer.

Pre-Trial Order.

Decision.

Order of Dismissal.

Motion for New Trial, Notice of Motion, Points and Authorities.

Ruling on Motion for New Trial.

Notice of Appeal. [58]

Bond for Costs on Appeal.

Designation of Contents of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 21st day of October, A.D. 1953.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, United States District
Court, District of Hawaii.

[Endorsed]: No. 14098. United States Court of Appeals for the Ninth Circuit. International Longshoremen's and Warehousemen's Union, Local 142, an unincorporated association, Appellant, vs. Libby, McNeill & Libby, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed: October 26, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14098

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 142, an Unincorporated Association,

Petitioner,

vs.

LIBBY, McNEILL & LIBBY, a Corporation,

Respondent.

STATEMENT OF POINTS ON APPEAL

The points upon which appellant will rely on appeal are:

1. The Court erred in dismissing the action upon the ground and for the reason that the Court lacks jurisdiction of the action.

2. The Court erred in refusing to grant a new trial.

Dated: Honolulu, T. H., October 14, 1953.

BOUSLOG & SYMONDS,

By /s/ MEYER C. SYMONDS,

Attorneys for Petitioner-Appellant.

[Endorsed]: Filed October 26, 1953.